

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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FERNANDO RIVERA,  
Plaintiff,

v.

GLENN S. GOORD, et al.,  
Defendants.

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**Hon. Hugh B. Scott**

03CV830

(CONSENT)

**ORDER**

Before the Court is plaintiff's letter application (dated Dec. 4, 2006, filed by the Court, Dec. 12, 2006, Docket No. 47) requesting to stay his deposition (he termed it "adjourned"), noticed for January 11, 2007, (see Docket No. 46, Notice of Deposition) pending decision on his interlocutory appeal (see Docket No. 44) from the Order (Docket No. 43) denying appointment of counsel.

From this Court's review of the filings with the United States Court of Appeals for the Second Circuit, while plaintiff filed his Notice of Appeal (Docket No. 44) with this Court and this Court's Clerk Certificate was sent (Docket No. 45), it appears that the appeal has not yet commenced before the Second Circuit. Furthermore, there may not be a basis under 28 U.S.C. § 1292(a) or (b) for an interlocutory appeal of the Order denying appointment of counsel (since it does not involve an injunction, appointment of a receiver, or admiralty case, and this Court has not declared that this issue involved a controlling question of law to which there is a substantial ground for difference of opinion and that an immediate appeal may materially advance the ultimate termination of the action, id. § 1292(b); see also Shakur v. Malcolm, 525 F.2d 1144,

1146-47 (2d Cir. 1975) (order denying motion to compel prison authorities greater paraprofessional visiting rights to civil rights plaintiff is not appealable on interlocutory appeal under § 1292(a)(1)). And, even if there was such appellate jurisdiction, this Court still retains jurisdiction over the balance of the case. As an interlocutory appeal under 28 U.S.C. § 1292(b), this Court's proceedings are not stayed by plaintiff's Notice of Appeal unless so ordered by this Court or by the Second Circuit, see 16 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice & Procedure § 3929, at 398 (Jurisdiction 2d ed. 1996). This Court will **not** treat plaintiff's Notice of Appeal here as a stay of this action and, treating this application as a motion for a stay pending this appeal, this Court also **denies** that request. As noted by commentators, there may be good reason to press on with the case despite the interlocutory appeal "particularly if there is any reason to fear that effective discovery is threatened by delay," id.

Here, plaintiff seeks to appeal an Order denying appointment of counsel and the appeal of this ruling should not delay completing discovery. Therefore, the Court **declines** plaintiff's request and the deposition should go forward as noticed.

So Ordered.

/s/ Hugh B. Scott  
Hon. Hugh B. Scott  
United States Magistrate Judge

Dated: Buffalo, New York  
December 14, 2006